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parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0717-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HECTOR L. LOPEZ,

Defendant-Appellant.

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Submitted February 13, 2018 – Decided April 6, 2018

Before Judges Yannotti and Mawla.

On appeal from Superior Court of New Jersey,  
Law Division, Morris County, Indictment No.  
08-08-0929.

Joseph E. Krakora, Public Defender, attorney  
for appellant (Carolyn V. Bostic, Designated  
Counsel, on the brief).

Fredric M. Knapp, Morris County Prosecutor,  
attorney for respondent (Paula Jordao,  
Assistant Prosecutor, on the brief).

PER CURIAM

Hector L. Lopez appeals from an order entered by the Law Division on June 29, 2016, which denied his petition for post-conviction relief (PCR) without a hearing. We affirm.

I.

On March 2, 2008, Arturo Gaviria was working as a detective in a Stop and Shop store in Morris Plains. At approximately 2:15 p.m., Gaviria observed a man, who he later identified as defendant, standing near the battery and film display. He observed defendant for about three to five minutes. He saw defendant grabbing items and placing them in a basket. Gaviria thought this was unusual because shoppers ordinarily do not grab items and throw them in their baskets. He observed defendant leave the store without paying for the items.

Gaviria followed defendant outside. He held up his badge and identified himself as "Stop and Shop Loss Prevention." Defendant began to run, and Gaviria tried to stop him by grabbing his shirt. Defendant dropped the basket of merchandise and started to hit Gaviria. As he pulled away, defendant's shirt ripped. Defendant ran to a blue van and got into the driver's seat.

Gaviria followed defendant and, as he attempted to start the van, Gaviria tried to stop him from putting the key into the ignition. Defendant punched Gaviria in the face and chest with a closed fist, which caused Gaviria's glasses to fall off and break.

Gaviria tried to get the keys away from defendant, and defendant reached for a silver object from the driver-side door compartment.

According to Gaviria, defendant tried to stab him. Gaviria heard a ripping sound and noticed that his jacket had been pulled down. When defendant tried to stab Gaviria a second time, Gaviria observed a "little kitchen knife" in defendant's hand. Gaviria was scared, tripped, and fell to the ground. Defendant drove away. When the police arrived, Gaviria described his assailant as a light-skinned Hispanic male with tattoos. Gaviria told the police the man had driven east on Route 10 in a blue minivan. He said defendant tried to stab him with a "wooden knife."

Gaviria was examined and treated by paramedics at the scene. A police officer informed him that the East Hanover police had stopped a person who matched the description he had provided. Gaviria was taken to the location of the stop. Gaviria observed defendant standing about three car lengths away. He identified defendant as the person who tried to stab him. Gaviria later testified that defendant was wearing the same clothes, including the torn shirt, that he had observed during the incident, and he also recognized the tattoos. Gaviria identified the knife as the weapon defendant used when he tried to stab him.

In September 2009, defendant was charged with two counts of first-degree robbery, N.J.S.A. 2C:15-1(a)(1) and (a)(2) (counts

one and two); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (count three); two counts of third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(2) and (b)(7) (counts four and five); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (count six); fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (count seven); third-degree terroristic threats, N.J.S.A. 2C:12-3(b) (count eight); and third-degree receiving stolen property, N.J.S.A. 2C:20-7(a) (count nine). The trial court denied defendant's motion to suppress evidence obtained in the motor vehicle stop.

Thereafter, defendant was tried before a jury. At trial, defendant moved to dismiss counts three, five, and eight, arguing that the State had not presented evidence showing serious bodily injury (count three) significant bodily injury (count five), or terroristic threats (count eight). The judge granted the motion to dismiss count eight, but denied the motion to dismiss counts three and five. The judge decided he would only charge the jury on attempt to cause serious or significant bodily injury. The jury found defendant guilty of two counts of second-degree robbery, N.J.S.A. 2C:15-1(a)(1) (counts one and two), and one count of third-degree receiving stolen property, N.J.S.A. 2C:20-7(a) (count nine).

The trial court sentenced defendant to an aggregate fifteen-year term of incarceration, with an eighty-five percent period of parole ineligibility, pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2. Defendant appealed from the judgment of conviction (JOC), which was apparently filed on December 2, 2009. In January 2013, we temporarily remanded the matter to the trial court to reconstruct the record of defendant's sentencing hearing. On March 19, 2013, the trial court conducted a hearing and reconstructed the record.

Thereafter, we affirmed defendant's conviction and sentence. State v. Lopez, No. A-1167-12 (App. Div. June 25, 2015). The Supreme Court later denied defendant's petition for certification. State v. Lopez, 223 N.J. 406 (2015).

On January 6, 2016, defendant filed a pro se petition for PCR. The court appointed counsel to represent defendant, and PCR counsel filed a brief, in which he argued that defendant had been denied the effective assistance of counsel because his trial attorney failed to argue that the use of force was justified in self-defense.

On June 29, 2016, the PCR court heard oral argument and entered an order denying defendant's petition without an evidentiary hearing. In an attached statement of reasons, the court found that the petition was not barred by Rule 3:22-12, and

the time bar established in that rule should be relaxed because defendant's failure to file a PCR petition within five years after the JOC was entered was due to circumstances beyond his control.

The judge also found that defendant failed to establish a prima facie case of ineffective assistance of counsel. The judge rejected defendant's claim that his attorney erred by failing to advance a claim of self-defense at trial. The judge determined that counsel made a valid strategic decision not to assert self-defense, and that defendant failed to show he was prejudiced by this strategy.

The judge noted that the testimony at trial established that Gaviria grabbed defendant's shirt in an effort to stop him after Gaviria identified himself as a loss-prevention employee. The evidence also established that as defendant continued to flee the scene, Gaviria followed him and attempted to grab the keys to the van. Defendant responded by punching Gaviria, causing his glasses to break. Defendant then attempted to stab Gaviria with a knife.

The judge determined that the evidence adduced at trial did not indicate that Gaviria used unlawful force against defendant during the incident. Therefore, defendant could not establish that he was prejudiced by his inability to argue that he acted in self-defense. The judge concluded that defendant failed to show that

but for counsel's failure to argue self-defense, the outcome of the trial would have been different.

On appeal, defendant raises the following arguments for our consideration:

POINT I

THE PCR COURT FAILED TO ADDRESS AND RULE UPON THE ARGUMENTS RAISED BY DEFENDANT IN HIS PRO SE PCR BRIEF AND, THEREFORE, THIS MATTER MUST BE REMANDED TO THE TRIAL COURT. (Not Raised Below).

POINT II

PCR COUNSEL FAILED TO COMPLY WITH HIS OBLIGATIONS UNDER [RULE] 3:22-6(d) AND, IN ADDITION, DEPRIVED DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PCR PROCEEDINGS AND, THEREFORE, THIS MATTER MUST BE REMANDED FOR THE ASSIGNMENT OF NEW PCR COUNSEL AND NEW PCR PROCEEDINGS. (Not Raised Below).

II.

As noted, the PCR court found that defendant failed to establish he was denied the effective assistance of counsel because his trial counsel failed to raise self-defense at trial. On appeal, defendant presents no argument for reversal of the court's decision on that claim. In any event, we are convinced that the court's decision is legally correct and supported by the record.

To establish ineffective assistance of counsel, a defendant must satisfy the two-prong test established in Strickland v. Washington, 466 U.S. 668, 694 (1984), and adopted by our Supreme

Court in State v. Fritz, 105 N.J. 42, 58 (1987). Under Strickland, the defendant must first show that "counsel's performance was deficient." 466 U.S. at 687. The defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Ibid.

The defendant must show that counsel's "representation fell below an objective standard of reasonableness." Id. at 688. The defendant is required to overcome the strong presumption that counsel exercised "reasonable professional judgment" and "sound trial strategy" in representing defendant. Id. at 689-90.

The defendant also must show that counsel's "deficient performance prejudiced the defense." Id. at 687. The defendant must establish that "counsel's errors were so serious as to deprive [him or her] of a fair trial, a trial whose result is reliable." Ibid.

It is not sufficient for a defendant to show that counsel's errors may have had some "conceivable effect on the outcome of the proceeding." Id. at 693. The defendant must establish a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. A



reasonable probability is a "probability sufficient to undermine confidence in the outcome." Ibid.

Here, the record supports the PCR judge's finding that defendant failed to establish that his trial counsel's representation was constitutionally inadequate because counsel did not raise a claim of self-defense at trial, and that defendant was not prejudiced by counsel's alleged deficient performance. Furthermore, because defendant did not present a prima facie case of ineffective assistance of counsel, the judge correctly determined that an evidentiary hearing was not warranted on the claim regarding self-defense. See State v. Porter, 216 N.J. 343, 355 (2013); R. 3:22-10(b).

### III.

On appeal, defendant argues that the PCR court erred because it failed to address the issues he raised in a pro se brief. Defendant contends the matter should be remanded to the PCR court so that the court can address these issues. We disagree.

In that brief, defendant argued: (1) the remand proceedings for reconstructing the record of the sentencing hearing were not conducted in accordance with Rule 2:5-3(f), and the extended sentence should not have been imposed; (2) he was denied his right to the effective assistance of counsel and the right to confront witnesses because his trial attorney failed to adequately

investigate the charged offenses; (3) counsel was ineffective because he did not object to the trial judge's decision to charge the jury on the attempt to cause serious or significant bodily injury; and (4) the State failed to prove all of the elements of second-degree robbery.

We note that the record does not establish that the defendant's pro se brief was ever filed with the PCR court. The copy of the brief included in the record does not contain a fully legible stamp indicating it was filed with the PCR court. Moreover, at oral argument in the PCR court, PCR counsel and the assistant prosecutor did not mention or address the arguments in that brief. Therefore, we reject defendant's contention that the judge erred by failing to address the issues raised in the brief.

Moreover, we are not convinced that the matter should be remanded to the PCR court to consider the issues defendant raised in his pro se brief. Rule 3:22-4(a) provides in pertinent part that a defendant may not assert in a PCR petition any ground for relief that was not raised in the proceeding resulting in his conviction or in an appeal taken in that proceeding, unless the court finds:

- (1) that the ground for relief not previously asserted could not reasonably have been raised in any prior proceeding; or

(2) that enforcement of the bar to preclude claims, including one for ineffective assistance of counsel, would result in fundamental injustice; or

(3) that denial of relief would be contrary to a new rule of constitutional law under either the Constitution of the United States or the State of New Jersey.

Defendant's arguments regarding the reconstruction of the sentencing record, the sentence, the judge's instructions, and the State's alleged failure to prove all of the elements of second-degree robbery are issues that defendant could reasonably have raised in his direct appeal from the JOC. Furthermore, defendant failed to establish that enforcement of the procedural bar as to these issues would result in a fundamental injustice, or contravene a new rule of constitutional law. Thus, Rule 3:22-4(a) precludes defendant from raising these issues in his PCR petition.

In his pro se brief, defendant also argues he was denied the right to the effective assistance of counsel and to confront witnesses against him because his trial attorney failed to investigate the matter adequately. In his brief, defendant asserts that at trial, the State presented the surveillance videotape, which shows him entering the store. He argues that his attorney was deficient because he failed to obtain the videotape showing him exiting the store.

According to defendant, if his attorney had obtained the videotape, he could have "effectively impeached" Gaviria's statements to the police "as to what actually occurred" outside the store. He contends counsel's failure to obtain a copy of the videotape permitted the State to present a "one-sided story" to the jury.

In representing a defendant in a criminal matter, a trial attorney "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Porter, 216 N.J. at 353 (quoting State v. Chew, 179 N.J. 186, 217 (2004)). To support a claim of ineffective assistance of counsel based on an alleged failure to investigate, a defendant "must do more than make bald assertions." Id. at 355 (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999)). The defendant must "assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." Id. at 353 (quoting Cummings, 321 N.J. Super. at 170).

Here, defendant's claim that the store's surveillance video would have allowed his attorney to effectively impeach Gaviria is a bald assertion, unsupported by an affidavit or certification. He also failed to show that the outcome of the trial would have

been different if his attorney had obtained a copy of the videotape.

We therefore conclude that the issues raised in defendant's pro se brief do not warrant a remand. Defendant's claims regarding reconstruction of the sentencing record, the sentence, the judge's instructions, and the State's alleged failure to prove its case are barred under Rule 3:22-4(a). In addition, defendant failed to establish a prima facie case of ineffective assistance of counsel, regarding the alleged failure of counsel to investigate the charged offenses.

#### IV.

Defendant also argues that he was denied the effective assistance of PCR counsel. He alleges that the PCR court initially advised defendant that his petition was deficient, and counsel was deficient because he did not file an amended petition. He alleges PCR counsel erred because he did not prepare a certification for defendant to support his claims.

He further alleges it is not clear whether PCR counsel was even aware of the "nature" of defendant's own arguments in support of PCR. At the oral argument before the PCR court, PCR counsel mentioned that defendant was asserting that he had little contact with trial counsel, but PCR counsel did not raise this issue in his brief, which was limited to the issue of counsel's failure to

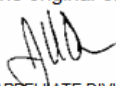
raise a claim of self-defense. Defendant also alleges PCR counsel did not raise all "available" claims.

We decline to consider these arguments, since they are raised for the first time on appeal. See State v. Arthur, 184 N.J. 307, 327 (2005) (citing Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)).

Accordingly, we affirm the PCR court's order of June 29, 2016, denying PCR, without prejudice to defendant asserting his claim of ineffective assistance of PCR counsel in a second PCR petition. See R. 3:22-4(b)(2)(C). We express no opinion as to the merits of any such claim.

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION